United States Department of Agriculture
FARM CREDIT ADMINISTRATION
Washington, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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For the

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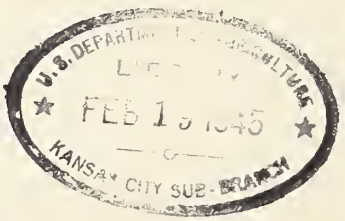

Patronage Refunds When Excludable

On September 29, 1944, the Tax Court of the United States decided the case of United Cooperatives, Inc. v. Commissioner of Internal Revenue, 4 T. C._____. The question for decision in this case was whether large amounts of money which had arisen from the operations of the association and which had been distributed on a patronage basis either in the form of stock, cash, or otherwise were excludable in computing the income taxes of this nonexempt organization. The decision is a long one and covers some 26 pages. The following quotations are taken from the opinion and show the basis thereof:

> "This case involves income and excess-profits taxes for the petitioner's fiscal years ended October 31, 1937, 1938 and 1939.
>
> The ultimate question here is whether certain 'patronage dividends' and 'patronage refunds' constitute a part of the gross income of the petitioner, or are, in reality, not the property of petitioner but of its several 'patrons'. There is no question involved of 'deductions' in the technical sense of the statute, for the petitioner's claim is the broad one that it is an agricultural cooperative, doing business not for its own profit but for the cheaper buying of agricultural and other goods by its members and, as such, is a mere conduit of their moneys. Incidental to the question of merit is that of the delinquency penalties demanded by respondent, which will attach if we hold for respondent on the essential question.
>
> Petitioner makes no contention that it is exempt from taxation; it merely contends that because of the nature of its organization and operation the amounts distributed to its patrons are not properly includible in its taxable income. The first question, therefore, which confronts us in our consideration of this case is whether petitioner is organized and operated as an agricultural cooperative association, on a cooperative basis. It is true that it was incorporated under the Indiana General Corporation Act but this, of itself, is not controlling. Eugene Fruit Growers Association, 37 B.T.A. 993. Petitioner was organized under this Act rather than under the Indiana Cooperative Marketing Law because under the latter at least nine incorporators were necessary, whereas petitioner, at the time of its incorporation, had only three members. Regardless of the form of organization used to bring petitioner into legal being, in reality, it was organized as a cooperative purchasing association and operated as such.
>
> Its purpose was and is to furnish 'on a cooperative basis', and without profit to itself, farm supplies and equipment to its member agricultural cooperative associations and through them to farmers. Most of its business was transacted with its members, but even the non-members with whom it dealt were, for the most part, agricultural cooperative associations and shared equally with members the patronage dividends or refunds made by it. That it was petitioner's

intention to operate on a cooperative basis is also borne out by the following additional facts: The member stockholders were each equally represented on the board of directors regardless of the amount of stock held; the return on its invested capital is limited to 8 percent; each member-stockholder has only one vote regardless of the number of shares held; the capital necessary to the conduct of petitioner's business is furnished by its members in proportion to the member's patronage.

Having decided that petitioner is, in substance and reality, organized and operated as an agricultural cooperative association on a cooperative basis, it would follow in the usual case that the so-called patronage dividends would be treated, for tax purposes, by the Treasury Department, as rebates upon the business transacted with its members, and would therefore be excluded from gross income in computing net income subject to tax. I. T. 1499, C. B. I-2, p. 191; L. M. 2288, C. B. III-2, p. 236; L. M. 2595, C. B. III-2, p. 238; G. C. M. 12393, C. B. XII-2, p. 398; G. C.M. 17895, C. B. 1937-1, p. 56; I. T. 3208, C. B. 1938-2, p. 127. This administrative practice has been sanctioned by the decisions of this Court. See Midland Cooperative Wholesale, 44 B. T. A. 824, 830.

However, this practice of excluding patronage dividends from gross income has been limited to those cases in which the right of patrons to such dividends arises by reason of the corporation charter, or by-laws, or some other contract, and does not depend upon some corporate action taken subsequent to its receipt of the money later so distributed, such as the action of the corporation's officers or directors. This limitation recognizes that if the money later distributed to patrons is received by the corporation without a legal obligation existing at the time of its receipt to later distribute it, it must be considered as the gross income of the corporation and, since there is no deduction permitted by statute of the amounts later distributed to patrons, it is taxable as such. See Midland Cooperative Wholesale, supra; Fruit Growers Supply Co., 21 B.T.A. 315, affirmed 56 Fed. (2d) 90.

Therefore, we must first determine whether additional corporate action is required to be taken before petitioner becomes definitely liable to pay so-called patronage dividends to its members and patrons. Such a liability can arise from the corporate by-laws. Farmers Union Cooperative Association, 13 B.T.A. 969; see also, Midland Cooperative Wholesale, supra. After a careful consideration of petitioner's charter and by-laws we conclude that petitioner's patrons were entitled as of right to a distribution of petitioner's net income as defined by Article VI of its by-laws as so-called patronage dividends without further corporate action on petitioner's part, and that the corporate resolutions set out in our findings merely recognized and confirmed the rights which the patrons already had insofar as they refer to the net income of petitioner available for distribution to its patrons after the payment of dividends on petitioner's common stock. These rights existed in non-members as well as members since it is obvious from the record that non-members

dealt with petitioner with the knowledge of and in reliance on, the by-laws of petitioner providing for 'patronage dividends'. See 18 Corpus Juris Secundum, p. 593.

After concluding as we have done that petitioner's patrons were entitled by reason of its charter and by-laws to so-called patronage dividends without further corporate action on its part, there still remains the question of whether its patrons were thus entitled to all of the patronage dividends here involved in the total amounts deducted by petitioner from its taxable income. Under Article VI of petitioner's by-laws, the board of directors could cause the payment of dividends on the outstanding common stock in amounts not exceeding 8 percent of the par value thereof and could cause the payment to a reserve for depreciation of 'such amount as the board of directors shall determine but not less than an amount equal to five per centum of the cost price of all property * * * subject to depreciation.' The patrons of petitioner were entitled by the terms of Section 6 of Article VI of the by-laws to 'all the net income of this corporation remaining after meeting the foregoing provisions of this article' referring to those provisions which authorized the payment of dividends and payments to the reserve for depreciation, as well as other payments. Thus, the amounts to be distributed to patrons pursuant to the petitioner's by-laws could not be ascertained until after the petitioner's board of directors had acted with regard to dividends and reserve; or had refrained from acting. If, for example, the board of directors had authorized the payment of 8 percent dividends on the common stock the net income to be distributed to its patrons would be correspondingly diminished. On the other hand if the directors determined that no dividends should be paid on its stock and therefore took no action with regard to declaring such dividends, the patrons were entitled to all of the net income of petitioner.

The right of the petitioner corporation to allocate a part of its receipts to a reserve for depreciation need not concern us. The establishment and maintenance of a depreciation reserve and periodic payments thereto in reasonable amounts constitute a proper operational expense, and the net income of petitioner available under its by-laws for distribution to its patrons would have been calculated by subtracting from gross income the payments to depreciation even without the express provisions of Article VI of the by-laws.

However, the right of petitioner's board of directors to declare dividends upon its common stock is radically different. These dividends, if paid, would be paid out of net income. If dividends were not paid, then the net income of petitioner available for distribution to its patrons would be accordingly greater. The choice of whether so much of its net income as equalled eight per centum of the par value of its common stock should be distributed to its stockholders as a dividend or to its patrons as rebates was in the corporation. Therefore it cannot be said that all of the money eventually distributed to its patrons as so-called patronage

dividends was received by petitioner with a legal obligation existing at the time of its receipt to later so distribute it.

We conclude that petitioner's patrons were entitled by reason of its by-laws to that part of the so-called patronage dividends distributed to them which was in excess of eight percent of the par value of petitioner's common stock outstanding and to that extent these patronage dividends were properly excluded from the taxable income of petitioner. However, that part of these patronage dividends which could have been distributed in the discretion of petitioner's board of directors as dividends upon petitioner's common stock must be considered as the property of petitioner and taxable to it as its income.

The fact that member patrons were under obligations with regard to the purchase of petitioner's stock under certain circumstances and that petitioner had a right to apply a part of the 'patronage dividends' to a satisfaction of such obligations, is immaterial. It does not affect the right of the member patrons to receive 'patronage dividends' but merely constitutes a permanent directive as to their application. The result of the procedure set up by petitioner's by-laws was as if the stockholder member who was under obligation to purchase additional stock had received, in cash, the 'patronage dividend' and had thereupon applied this sum to the payment of his stock. The stock, when thus paid and issued to him, was not in the nature of a stock dividend but represented an additional investment on his part to the capital of the corporation out of his savings from the annual transactions with petitioner."

The organization papers of the association were elaborate and comprehensive and, as indicated in the foregoing quotations, the court found that the charter and bylaw provisions constituted a contract under which the association was obligated to pay all excess amounts over operating costs and expenses and 8 percent dividends on the stock to the stockholders of the association, and that the association received the money "with a legal obligation existing at the time of its receipt to so distribute it." Emphasis should be placed upon the fact that the court stressed that action on the part of the board of directors of the association was entirely unnecessary and that the liability of the association to pay the amounts in question to its stockholder members existed entirely independent of any action on the part of the board of directors.

It is clear, therefore, that this case should not be considered as authority authorizing any cooperative association to deduct amounts which it returns to its patrons in the form of cash or stock in computing its income taxes. In the case of most cooperative associations, the organization papers do not constitute a contract obligating the association to return underpayments or overcharges but, on the other hand, in the case of most associations, this is a matter that rests entirely in the discretion of the board of directors of the association. Ordinarily, the board of directors of an association has as much discretion regarding the payment of patronage dividends as they have regarding the

payment of dividends on stock. As a matter of fact, the court in this case announces a stricter rule than has been followed by the Bureau of Internal Revenue in that, in general, heretofore, if an association had a by-law showing it was contemplated that the board of directors might declare patronage dividends, and if such a declaration was made by the board of directors prior to the end of the tax year, the Bureau of Internal Revenue has allowed the deduction in computing the income taxes of a nonexempt association of amounts thus actually distributed. Attention is called to the fact that although the association had not paid any dividends on its stock at all during the years in question, the court held that the right which the association had, acting through its board of directors, to declare dividends on the stock up to 8 percent, gave the association jurisdiction over the requisite amount of money required for the payment of such dividends. Therefore, the court held that, inasmuch as the association had control over the amounts that it might have distributed in the form of dividends on the stock up to 8 percent, the association must pay income taxes on such amounts of money.

Retroactivity of Tax Rulings

Section 3791 (b) of the Internal Revenue Code authorizes the Secretary of the Treasury or the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to "prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect. The section reads as follows:

> "(b) Retroactivity of regulations or rulings. The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect".

The authority conferred by this section is sometimes exercised in a case in which a ruling holding an organization exempt is revoked and thus the revocation is limited in its retroactive effect or is given a prospective effect only.

Agricultural Labor - National Labor Relations Board

The National Labor Relations Board instituted proceedings against Idaho Potato Growers, Inc., and a number of independent handlers of Idaho potatoes alleging that they had engaged in, and were engaging in, unfair practices within the meaning of Section 8(3), Section 2(6) and (7) of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. 151 et seq. In due course, the Board issued an order against the defendants who then carried the case to the Circuit Court of Appeals for the Ninth Circuit (Idaho Potato Growers, Inc. et al, v. National Labor Relations Board, 144 F. 2d 295).

It appeared that the labor involved was labor which was engaged in the preparing of potatoes for market either at warehouses of the shippers

or on the farms on which the potatoes were raised. In its opinion, the court said:

> "Very briefly it may be said that produce men, petitioners here, buy or handle under contract a large portion of the great potato crop of Idaho. After the potatoes are dug, they are taken to a place for sorting, washing, grading and packing. Sometimes this readying for shipment is done in "cellars" on the farms and sometimes in the produce men's warehouses. The laborers who do this readying are crews employed by produce men and are called "warehouse and cellar" crews. In some instances the farmer assists in the readying. In a few instances the produce man also grows potatoes. In some instances persons working in the warehouse and cellar crews live in the vicinity of such activity and, when this seasonal work is over, go back to other employment or to the farms. Ownership in the produce remains with the grower until it is graded, and as to Idaho Potato Growers, Inc., ownership is unchanged until the dealer sells them. The cost of packing is sometimes borne by the grower."

The principal question for decision was, "Are the employees involved * * * engaged as agricultural laborers?"

In Section 2, subdivision (3) of the Act [29 U.S.C.A. § 152(3)], it is provided that "the term 'employee' * * * shall not include any individual employed as an agricultural laborer * * *."

In holding that the employees involved were not engaged in agricultural labor, the court, in the majority opinion, said:

> "As has been noted the employees are grouped by the potato dealers into cellar-warehouse crews which go to different farms and to the dealers' warehouses and prepare the potatoes for movement into the market (see note 3). The Board contends that these employees are not exempt from the terms of the National Labor Relations Act as 'agricultural laborers.'
>
> Petitioners set out in full the United States Department of Agriculture's definition of agricultural labor and state that the Social Security Board would consider the employees involved in this case as 'agricultural laborers' and that the 'Victory Tax' is levied under the same definition. Several Idaho cases are also cited in the opening brief. It must be borne in mind, however, that the purpose of the statutes governing these federal and state activities are very different from the purposes of the so-called Wagner Act (National Labor Relations Act), with which we are here dealing. In determining whether or not the employees in the case are agricultural laborers, we must make a sharp cleavage in the basis of our reasoning. We must determine that all persons who perform labor, which is sometimes done, and which some years ago was habitually done, by the farmer, are agricultural laborers; or we must consider the purposes of the Wagner Act and hold that employees who are not working at farming, but who are specializing

in the preparation of farm products for trade or shipment after they have been reaped or gathered, are not agricultural laborers. In the cases of North Whittier Heights Citrus Ass'n. N.L.R.B., 9 Cir., 109 F. 2d 76, and N.L.R.B. v. Tovrea Packing Co., 9 Cir., 111 F. 2d 626, we took the latter line of reasoning and more particularly set it out in the opinions of those cases. We adhere to the reasoning followed in those cases.

We think, essentially speaking, the laborers in the instant case occupy a similar status as the laborers do in North Whittier Citrus Ass'n. v. N.L.R.B., supra, and N.L.R.B. v. Tovrea Packing Co., supra, and since we have seen by note 2 that petitioners are employed in interstate activities, it follows, and we so hold, that they are within the reach of the Labor Act."

One of the other questions for decision was, 'May the petitioners be guilty of unfair labor practices if the same were committed by the growers and farmers or under their control?"

It appeared that the growers of potatoes had objected to the unionization of the laborers concerned. The petitioners contended that they "are not accountable for acts of petitioners, which the Board sets up as unfair labor practices, as they were performed by petitioners under threats. Testimony upon this branch of the case is summarized in note 4, wherein also it appears that some of the petitioners appeared or sent representatives, and some members of the crews also attended. There is no doubt but that the petitioners were alarmed and impressed by the farmer opposition to the unionization of the cellar-warehouse crews, but this in no wise made the acts of the dealers any the less their own. 'In fact nothing in the statute permits or justified its violation by the employer.' N.L.R.B. v. Star Pub. Co., 9 Cir., 97 F. 2d 465, 470; N.L.R.B. v. Polson Logging Co., 9 Cir., 136 F. 2d 314."

Another question upon which the Court passed was, "Were the petitioners justified in refusing to bargain with the union until the union established it's right to represent a majority of the employers?"

In disposing of this question, the court said, in part:

"The whole case indicates that this question was not a moving factor in the difficulties. It is apparent that petitioners were opposed to the union affiliation of their crew members. If they had any doubt about the majority status, it would have been very easy to have demanded proof upon this union claim. If a majority had been found lacking, the whole trouble would have been over."

In the Circuit Court of Appeals, the National Labor Relations Board petitioned for enforcement of its original order, and the court denied the petitioners relief and granted the petition for enforcement of the order of the National Labor Relations Board. In the concurring opinion of Judge Fee he made it clear he was of the opinion that the labor involved, at least that which was performed on the farms, was agricultural labor and, hence, was exempt from the National Labor Relations Act.

The following quotations are taken from his concurring opinion:

> "It may be agreed that the persons hired by the warehousemen and dealers to engage in the operations of sorting and grading potatoes at the warehouse and away from the farms, are employees subject to the Act, even though the farmer may still retain the title to the potatoes and may, indirectly, pay the price of the work, but the differentiation between such employees and those persons engaged as members of cellar crews, is plain. The initial confusion was caused when the attempt was made to organize cellar crews and the warehouse crews in one union, notwithstanding the direct language of the Act preventing organization of the agricultural laborer.
>
> * * * * * *
>
> "No language in the order of the Board expressly directs any of the plaintiffs to do, or to cease and desist from doing, anything with respect to members of cellar crews. There is nothing in the order to preclude plaintiffs from assembling such crews of unorganized workers separately from the warehouse crews, or to prevent farmers, either separately or cooperatively, from hiring their own cellar crews. Therefore, the writer concurs in the result. If the order of the Board could be interpreted by reference to relate to cellar crews, the writer would be compelled to dissent."

Attention is called to the fact that there is no over-all definition of agricultural labor. For instance, in the case of the National Labor Relations Act, there is no statutory definition of agricultural labor, and that statute simply provides that the term "employee" "shall not include any individual employed as an agricultural laborer" (29 U.S.C. 152), but what constitutes an agricultural laborer is left for the determination of those charged with the administration of the statute and the courts. On the other hand, the Fair Labor Standards Act exempts "any employee employed in agriculture" (29 U.S.C. 213) and agriculture is defined in 29 U.S.C. 203 as follows:

> "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

(See Miller Hatcheries v. Boyer, 131 F. 2d 283).

Again, the Federal Social Security Act (42 U.S.C. 409) and the State statutes which have been enacted by States desirous of obtaining the benefits of the Federal Act contain a definition of the term "agricultural labor" that is apparently even broader and more comprehensive than that given in the Fair Labor Standards Act (See Cache Valley Turkey Growers Ass'n. v. Industrial Com'n. (Utah), 144 P. 2d 537; Summary 22, p. 5).

"Sunkist" Trade-mark Infringement Case

California Fruit Growers Exchange and California Packing Corporation successfully maintained a suit against Irene Gonska and Joe Grossman, doing business under the name and style of Sun-Kist Wine Company (California Fruit Growers Exchange et al. v. Gonska et al., 55 F. Supp. 499) on the ground that they were infringing on their respective trade-marks "Sunkist" and "Sun-Kist." The court said:

> "Plaintiff, California Fruit Growers Exchange, has employed the trade-mark Sunkist since 1907 and has sold approximately One Billion Five Hundred Million Dollars ($1,500,000,000) worth of goods bearing such trade-mark, and has expended more than Thirty-Five Million Dollars ($35,000,000) in advertising the same.
>
> Certificates of registration for the trade-mark Sunkist have been issued by the United States Patent Office to plaintiff, California Fruit Growers Exchange, for oranges, lemons, citrus fruits, oils and acids, pectin, citrus-flavored non-alcoholic maltless beverages as soft drinks and concentrates for making the latter, all as set out in the complaint in this action.
>
> Plaintiff, California Packing Corporation, has employed the trade-mark Sun-Kist since 1907 and has sold in excess of Thirty-Five Million Dollars ($35,000,000) worth of goods bearing said trade-mark, and has expended in excess of Three Hundred Thousand Dollars ($300,000) in advertising the same.
>
> Certificates of registration for the trade-mark Sun-Kist have been issued by the United States Patent Office to plaintiff, California Packing Corporation, for canned and dried fruits and vegetables, milk, butter, walnuts, catsup, pickles, olive oil, jams, jellies, olives, coffee, tea, beans, pineapple juice, grape juice, tomato juice and various other products, all as set out in the complaint in this action."

The defendants were engaged in the business of bottling and selling wine under the name of "Sun-Kist Wine Company." Each bottle of wine sold by defendants carried a label bearing the name "Sun-Kist Wine Company," and on some of the bottles the words "Sun-Kist Wine" were blown into the bottles. The name "Sun-Kist Wine Company" appeared upon the exterior of the place of business occupied by them and upon their stationery and invoices, and upon the doors of their trucks. The court found that the goods of the plaintiff and the goods of the defendants were sold in the same channels of trade and that the defendants had attempted to capitalize upon the trade-marks "Sunkist" and "Sun-Kist" of plaintiffs. The court found that:

> "Defendants have infringed upon the registered trade-marks Sunkist and Sun-Kist owned by plaintiffs by use of the trade-name "Sun-Kist Wine Company."
>
> Defendants have competed unfairly with plaintiffs, and defendants have been guilty of unfair trade practices, in employing the word

"Sun-Kist" in defendants' trade-name and in affixing the word "Sun-Kist" to the bottles containing the wine sold by defendants."

Ordinance Fixing Size of Milk Bottles Upheld

The Independent Dairymen's Association, Inc., a nonprofit corporation of dairymen, and three dairy companies engaged in the bottling and sale of milk and cream in standard gallon size bottles, brought suit in the District Court of the United States for the District of Columbia to have an ordinance of the City of Denver reading -

> "Milk or cream when sold in bottles may be sold in standard size bottles as follows: Two-quart, quart, pint, half-pint and quarter-pint or ten-ounce bottles. Sale of milk or cream in bottles of any other size or capacity is hereby prohibited." -

held invalid, and to enjoin its enforcement.

The District Court dismissed the action but granted an injunction against the enforcement of the ordinance until an appeal could be passed upon. In Independent Dairyman's Assn., Inc., et al. v. City and County of Denver, 142 F. 2d 940, the Circuit Court of Appeals for the Tenth Circuit held the ordinance valid, apparently on the ground that there was a factual basis to uphold its reasonableness. The court said:

> "We may only inquire whether it so lacks any reasonable basis as to be arbitrary. Debatable questions as to reasonableness are not for the courts, but for the legislature, which is entitled to form its own judgment. We may not set aside the ordinance because compliance with it is burdensome."

Administrative Remedies Must First Be Exhausted

In the case of La Verne Co-op. Citrus Association et al. v. United States, 143 F. 2d 415, it appeared that the Secretary of Agriculture had issued an order regulating the handling of lemons grown in the States of California and Arizona which order became effective on April 10, 1941. The order was issued by the Secretary of Agriculture pursuant to the provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended and as reamended and amended by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C.A. Section 601, et seq.

The United States successfully brought a suit for an injunction in a Federal District Court against five cooperative associations handling lemons, alleging that they had violated the terms of the order issued by the Secretary, which judgment was affirmed on appeal. The defendants "admitted that they had shipped an excessive quantity of lemons during the period specified in disregard of the order." The defendants objected before the Secretary of Agriculture to the order and diligently pursued their administrative remedy, but a final decision had not been rendered on the proceedings initiated by the defendants with a view of having the order changed by the Secretary to meet their views. The instant case presented the question of whether the Government was entitled to obtain

an injunction against the defendants for violating the terms of the order under the circumstances. The cooperative associations, on appeal, claimed that they were being denied due process of law on the ground that the statute under which the Secretary of Agriculture had issued the order made

> "no provision for a supersedeas or stay of an order pending final decision in review proceedings. They rely strongly on Porter v. Investors' Syndicate, 286 U.S. 461, 470, 471, 52 S. Ct. 617, 621, 76 L. Ed. 1226, wherein the court comments that even though a decision of an administrative board is given finality by a state statute, there is no deprivation of due process if the complaining party may have a stay pending such final determination, but that if the statute or court decisions 'preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.'."

In disposing of this contention, the court said in part:

> "The facts of the instant case do not fit the language quoted from the Porter case, supra. The Act involved herein nowhere prohibits relief from the operation of an order of the Secretary. There is nothing in the Act in any way inconsistent with a stay of such an order. There is no indication that a complaining party could not secure a stay from the Secretary while the petition for modification was before him, or from the district court while review proceedings were before it. Appellants made no application for such a stay. Their failure to do so cannot be used to support their argument that due process has been denied them, particularly since they have not shown inadequacy with respect to the available administrative relief. Yakus v. United States, 64 S. Ct. 660; Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310, 58 S. Ct. 199, 82 L. Ed. 276.

Adequate remedy at law

In Farmers' Dairy League, Inc. v. City and County of Denver et al, 149 P. 2d 370, the plaintiff unsuccessfully brought an injunction suit against the City and County of Denver to restrain the enforcement of an ordinance of that City which prohibited the sale of milk or other dairy products within 1 mile of the exterior limits of said City if the persons offering it for sale knew or had reason to believe that the milk or other dairy products were purchased for use or consumption within the City and County of Denver, unless the milk or other dairy products had been "produced, handled, processed, and distributed in conformity with the requirements of the ordinances of the City and County of Denver and the rules and regulations of the Health Department thereof * * *". The suit failed because the court held that the plaintiffs had an adequate remedy at law in that if they saw fit not to observe the ordinance and were prosecuted on account of a violation thereof that all of the questions involving the validity and constitutionality of the ordinance could be decided in such a proceeding. See 28 Am. Jur. p. 374, § 186;

In re Sawyer, 124 U.S. 200, 211, 8 S. Ct. 482, 488, 31 L.Ed. 402. But see Exparte Young, 209 U.S. 123, in which the court said:

> "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Independent contractor or employee

In the case of Rochester Dairy Co. v. Christgau ____ Minn. ____, 14 N.W. 2d 780, the question for decision as stated by this Court was whether one Walters was an independent contractor or was an employee of the Rochester Dairy Company. If he was an employee, then that Company was required to pay to the State of Minnesota unemployment contributions under the Employment Compensation Act of that State. On the other hand, if Walters was an independent contractor, the Company was not required to make any employment contributions. The referee who passed upon the matter in the first instance held Walters was an employee of the Rochester Dairy Company and that the Company was, hence, liable for unemployment contributions. An appeal was then taken by the Company to the State District Court which held that Walters was an independent contractor and then the Director "of the Division of Employment and Security" of the State of Minnesota appealed the case to the Supreme Court of that State which affirmed the judgment of the trial court. In doing so, the court said:

> "As we have seen, the contract was in writing, drawn in such terms as to leave no doubt that the parties deemed the relationship on the part of the hauler to be that of an independent contractor. Therein the hauler agreed, for a fixed price, to pick up each day, Sundays and holidays included, upon an established route, the milk of designated farmers who produced the milk, and haul the same to the dairy's plant at Rochester. When the cans were emptied there, the hauler was required to return them to the owners on the next day's trip. The farmers paid a stated price of 15 cents per 100 pounds of milk so hauled. As a matter of convenience and agreement, the dairy paid the hauler that price and reimbursed itself by charging the amount against each farmer, deducting the amount due from the credit given the farmer for the milk delivered. Furthermore, the hauler was required to and did furnish, at his own risk, the equipment needed and used by him on the job. He had 'full and complete liberty to use his own free and uncontrolled will, judgment and discretion as to the method and manner of his performance of each and every obligation' assumed by him, all 'without any right whatever on the part' of the dairy 'to direct or control in any way or in any degree' the hauler's contractual performance. He was required to 'furnish workmen's compensation insurance * * * on his own employees; also public liability and property damage insurance on all equipment used' in the discharge of his contractual obligations. Such, briefly, are the terms of

the contract. It was performed by the parties in good faith. There was no fault found with it as long as the parties operated under its provisions.

Under the circumstances related and viewing the record as a whole, we think that the hauler here, as determined by the trial court, was an independent contractor. Our reasons for this conclusion are found in Moore v. Kileen & Gillis, 171 Minn. 15, 213 N.W. 49, where our prior cases are reviewed. What the court there determined, upon facts rather similar to those here shown, is worthy of quotation (171 Minn. 19, 213 N.W. 50):

'* * * While the purpose of the law is remedial and it is not only expedient but highly just to give it a broad rather than a narrow scope, there are still limits beyond which it cannot be carried by judicial interpretation. We deny its effect on this case because it is one of independent contract and expressly excluded by section 4290 ***.'"

For a rather exhaustive discussion of the law with respect to whether a person is an independent contractor or employee insofar as unemployment taxes are concerned, see Meredith Publishing Company v. Iowa Employment Security Commission, _____Iowa_____, 6 N.W. 2d 6.

Office of Bylaws

In the opinion of the Supreme Court of Minnesota in Diedrick v. Helm _____Minn._____, 14 N. W. 2d 913, the following appears:

"The office of a by-law is to establish rules for the internal government of the corporation. Bergman v. St. Paul Mut. Bldg. Ass'n, 29 Minn. 275, 13 N. W. 120. By-laws have the same force and effect as provisions of the charter or articles of incorporation and must be obeyed by the corporation, its directors, officers, and stockholders. Borgards v. Farmers' Mut. Ins. Co., 79 Mich. 440, 44 N. W. 856; J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co., 18 N. D. 253, 119 N. W. 1048; Kavanaugh v. Commonwealth Trust Co., 223 N. Y. 103, 119 N. E. 237; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 406, 236 N. W. 657. A by-law is permanent and continuing in nature and must be observed until legally changed. Weatherly v. Medical & Surgical Society, 76 Ala. 567; Griffith v. Klamath Water Ass'n, 68 Or. 402, 137 P. 226; North Milwaukee Town Site Co. v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L.R.A. 174."

In making the foregoing statement, the court was proceeding on the theory that what purported to be a bylaw was in fact a valid bylaw. Not all so-called "bylaws" are valid bylaws. Not all matters are proper subjects for bylaws and, hence, a "bylaw" on such a subject is invalid. (G. W. Jones Lumber Co. v. Wisarkana Lumber Co., 125 Ark. 65, 187 S.W. 1068.) Some "bylaws" are invalid because they were not adopted in accordance with law or they may be invalid for other reasons. (Gaskill

v. Gladys Belle Oil Company, 16 Del. Ch. 289, 146 A. 337; Security Savings & Trust Company v. Coos Bay Lumber & Coal Company, 219 Wis. 647, 263 N.W. 187.)

In many States a "bylaw" which is invalid as a bylaw may be upheld as a contract among those who voted therefor. (Strong v. Minneapolis Automobile Trade Ass'n., 151 Minn. 406, 186 N.W. 800; New England Trust Co. v. Abbott, Exr., 162 Mass. 148, 38 N.E. 432, 27 L.R.A. 271; Searles v. Bar Harbor Banking & Trust Company, 128 Me. 34, 145 A. 391, 65 A.L.R. 1154.)

Generally speaking, bylaws are not effective against third persons unless they have notice of them, when they are usually held to be binding on them. (Harley v. Hartford Fruit Growers' & Farmers' Exchange, 216 Mich. 146, 184 N.W. 507; Rundell v. Farmers' Co-operative Elevator Co. of Corunna, 210 Mich. 642, 178 N.W. 21.)

On the other hand, valid bylaws are binding on officers, members, and directors even though they are ignorant of them (Washington Co-op. Egg & Poultry Ass'n. v. Taylor, 122 Wash. 466, 210 P. 806).

Convenience and Necessity

In the case of Farmers Co-op. Eq. Union Shipping Ass'n et al v. Public Service Commission (Wis.) 13 N.W. 2d 507, it appeared that Gordon P. Bush was engaged in the business of transporting farm products by motor vehicle as a contract carrier. He filed an application to amend his license as a contract carrier for the purpose of procuring authority to haul livestock for the Farmers Cooperative Equity Union Shipping Association to Madison and Milwaukee, Wisconsin. The Public Service Commission of the State denied the application filed by Bush. An appeal was then taken to the Circuit Court for Dane County, Wisconsin, which reversed the holding of the Public Service Commission and the Commission then appealed the case to the Supreme Court of Wisconsin. In affirming the judgment of the trial court that court said:

> "The appellant makes the following statement in its brief: 'If, as appears to be the law under the decision in the United Parcel Case, supra (United Parcel Service v. Public Service Comm., 240 Wis. 603 [4 N.W. 2d 138, 143, 5 N.W. 2d 635] the only evidence which the commission should consider in arriving at its decision was the effect of said plaintiff's proposed operations upon congestion of the highways and the service of "common motor carriers" and of steam and electric railways, it is frankly conceded that the evidence before the trial court showed no such effects; and the finding of that court, as to the unreasonableness of the order, is supported by the clear preponderance of the evidence. In fact, there is no evidence to show that such proposed operations would unduly congest the highways. Neither does the evidence indicate that there is any "common motor carrier" or steam or electric railway which would be affected by such operations.'
>
> The appellant contends that the doctrine as announced in United Parcel Service v. Public Service Comm., supra, is erroneous.

Appellant urges that the decision in that case be reconsidered and overruled. We have given the case further consideration and adhere to the decision therein. It rules the instant case in favor of respondents, particularly in view of the frank concession made in appellant's brief, above quoted.

Upon the findings, all of which are amply sustained by the evidence, under the rule in United Parcel Service v. Public Service Comm., supra, that 'if there is a reasonable need apparent for the use of the service and if the common carrier is not unduly interfered with nor the public highways unduly burdened, a case of convenience and necessity exists,' the application of the plaintiff Bush to amend his contract motor carrier license should have been granted."

Entity of Corporation in Abeyance

In the tax case of Commission Credit Co. v. O'Brien (Mont). 146 P. 2d 637, a parent and foreign corporation held all of the stock of a subsidiary corporation organized and operating in Montana and the two corporations were treated as one concern in determining the taxes payable on intangibles regularly and habitually used by such corporations in Montana. The basis for the holding of the court is set forth in the following quotation from the opinion:

"Section 5933, Revised Codes, provides: 'The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three nor more than thirteen directors, to be elected from among the holders of stock * * *. Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation,' etc.

In Scott v. Prescott, 69 Mont. 540, 559, 223 P. 490, 496, this court, in referring to the above quoted provisions of section 5933, Revised Codes, said: 'The result of the requirement is that, when the capital stock passes into the hands of a single person, the entity of the corporation, except so far as it is necessary to protect the rights of strangers, who deal with it through its ostensible officers and agents, is entirely in abeyance, and its functions for the time being cease. So it is held by the current of authority.' (Citing numerous authorities.)"

It is clear from the foregoing quotation that inasmuch as each director of a Montana corporation was required to be a shareholder and as the parent corporation owned all of the stock, the court was of the opinion that the corporate entity of the subsidiary was "entirely in abeyance."

This case emphasizes the importance of having the status in a particular State of a subsidiary corporation carefully ascertained before its organization. In general, of course, a properly organized and bona fide subsidiary corporation is regarded as an entity separate and apart from, the parent corporation. See Cannon Manufacturing Company v. Cudahy Packing Company, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634; People v. American Bell Telephone Company, 117 N.Y. 241, 22 N.E. 1057.

If the fact that the directors of a corporation must be stockholders, coupled with the fact that all the stock of the subsidiary was owned by the parent corporation, operated to place the corporate entity of the subsidiary in Montana in abeyance, one may ask if the election as directors of persons who are not stockholders of a nonsubsidiary corporation would have had a like effect in that State.